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No. 89-1773

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

SUZANNE E. GWIN,
Petitioner,

VS.

G. D. SEARLE & CO., a Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the due process clause of the fifth amendment requires that a plaintiff be afforded the opportunity to present oral argument on her motion for discretionary relief from judgment in a product liability lawsuit in which plaintiff sought recovery of damages for personal injuries, including alleged infertility.

RULE 29.1 STATEMENT

As required by Rule 29.1 of the Rules of the United States Supreme Court, G. D. Searle & Co. states that its parent company is Monsanto Company, and that it has no subsidiaries.

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Respondent G. D. Searle & Co. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. As discussed below, the Petitioner Suzanne E. Gwin seeks review of matters which were never raised in the courts below and do not meet the suggested standards for review set forth in Supreme Court Rule 17.1.

I.

COUNTERSTATEMENT OF THE CASE

Petitioner Suzanne E. Gwin ("Gwin") filed a complaint against G. D. Searle & Co. ("Searle") on March 5, 1986. Gwin alleged in the complaint that, as a result of her use of Searle's prescription contraceptive, she sustained injuries to her reproductive organs resulting in loss of fertility. On January 5, 1987, the

district court sent a notice of dismissal for lack of prosecution to the parties directing counsel to file affidavits within certain dates and to appear before the court on February 4, 1987, to show cause why the action should not be dismissed. On January 27, 1987, Searle timely filed an affidavit supporting dismissal, and mailed a copy of the affidavit to counsel for Gwin. Gwin failed to file an affidavit in opposition to dismissal.

A hearing with regard to the court's motion to dismiss for lack of prosecution ("dismissal hearing") was held, as scheduled, on February 4, 1987. Counsel for Searle appeared at the hearing. No appearance was made on behalf of Gwin. Pursuant to E.D. Cal. Local Rule 271 and Fed. Rule Civ. P. 41(b), the court dismissed Gwin's action with prejudice for lack of prosecution. Searle sent a copy of the court's order dismissing the action to counsel for Gwin on February 10, 1987. Judgment was entered on February 11, 1987, and the court sent notice that judgment was entered to the parties on the same date. On May 20, 1988, more than a year after entry of the judgment, Gwin moved for relief from the judgment under Fed. R. Civ. P. 60(b)(6).

In her motion for relief from judgment ("Rule 60(b) motion"), Gwin claimed that neither she nor her counsel received notice of the dismissal hearing, or of the entry of judgment dismissing the action for lack of prosecution. In support of her motion, Gwin submitted a memorandum of points and authorities, her own affidavit, affidavits from her attorneys and members of her attorneys' office staff, and documentary evidence, including a copy of her attorneys' office calendar. After reviewing the entire record before it, the district court was "convinced" that oral argument would be of no material assistance, and ordered the matter submitted on the moving papers pursuant to E.D. Cal. Local Rule 230(h). Pet. at 6a.[1]

The district court denied Gwin's motion for relief from judgment. The court found that Gwin's counsel received notice of the dismissal hearing, and concluded that, since Gwin had not established a reason for failing to appear at the hearing, she had not

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[1]Page references ending in "a" are to pages in the appendix to the petition for writ of certiorari.

demonstrated "extraordinary circumstances" warranting relief under Rule 60(b)(6). The court further concluded that Gwin failed to demonstrate that the motion for relief from judgment was made within a reasonable time, as required by Rule 60(b).

Gwin appealed the district court's ruling to the Ninth Circuit, asserting four separate grounds for reversal: (1) abuse of discretion in denying the motion; (2) failure of the court to base its findings on all of the evidence submitted for hearing; (3) application of an incorrect evidentiary standard; and (4) abuse of discretion in denying oral argument.

On November 15, 1989, the Ninth Circuit affirmed. The court reviewed the record upon which the district court had based its opinion, and found: (1) that the court had not abused its discretion when it concluded that Gwin had not established the extraordinary circumstances necessary to obtain relief under Rule 60(b)(6);[2] (2) that the correct evidentiary standard had been applied by the court; (3) that there was no merit to Gwin's argument that the court had not reviewed all relevant evidence submitted for the hearing on the motion; and (4) that the court had not abused its discretion in denying oral argument.

On December 4, 1989, Gwin filed a petition for rehearing and suggestion for rehearing en banc. In the petition, Gwin argued for the first time that the district court's denial of oral argument on her motion for relief from judgment violated her right to due process under the fifth amendment to the United States Constitution. On February 12, 1990, the Ninth Circuit denied the petition for rehearing, and rejected the suggestion for rehearing en banc, without comment.

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[2]To the extent that the Petition requests this Court to review the factual findings of the courts below, it is improper. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

II.

REASONS FOR DENYING THE WRIT

A. *The Question Presented In The Petition For Writ Of Certiorari Was Not Timely Raised*

The sole Question Presented in the petition for writ of certiorari (the "Petition") is whether the due process clause of the fifth amendment requires that Gwin be afforded an opportunity to present oral argument on her motion for relief from judgment. That question was not decided below.

In her appeal to the Ninth Circuit, Gwin asserted, *inter alia*, that it was error for the district court to deny her the opportunity to present oral argument on her motion. However, she claimed that the court's action constituted an abuse of discretion — not that it was a violation of her right to procedural due process. The Ninth Circuit limited its review to the question presented on appeal, and concluded that the district court had not abused its discretion. Thereafter, Gwin filed a petition for rehearing in which she challenged, for the first time, the constitutionality of the district court's action.

The Ninth Circuit properly denied Gwin's petition for rehearing. A petition for rehearing serves the limited purpose of "directing the attention of the court to some controlling matter of law or fact which a party claims was overlooked in deciding a case." *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962); *see also*, Fed. R. App. P. 40(a). For that reason, courts generally refuse to consider new grounds for reversal raised for the first time in a petition for rehearing. *See, e.g., Bullock v. Mumford*, 509 F.2d 384, 388 (D.C. Cir. 1974) ("[a]ssertion of due process defects not dealt with in the opinion, now comes too late"); *Jamestown Farmers Elevator, Inc. v. General Mills*, 552 F.2d 1285, 1296 (8th Cir. 1977) ("It is now far too late in the day for appellant to raise this new claim of error.").

Having failed to obtain a new hearing before the Ninth Circuit, Gwin now asks this Court to consider her untimely due process claim. "Ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231,

234 (1976); *United States v. Mendenhall,* 446 U.S. 544, 551-2 n.5 (1980); *Adickes v. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *Delta Airlines v. August,* 450 U.S. 346, 362 (1981) ("question presented in petition but not in court of appeals is not properly before us"). Rather, it has long been the stated policy of this Court to review a question not raised below only in exceptional cases:

> This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

Duignan v. United States, 274 U.S. 195, 200 (1927); *Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958).

Gwin has offered no explanation for her failure to timely raise her due process claim. In fact, she has completely ignored this issue in the Petition. Moreover, nothing in the record suggests that there are exceptional circumstances here. *Cf. Standard Indus. v. Tigrett Indus., Inc.,* 397 U.S. 586, 587 (1970). Thus, there is no reason in this case for the Court to depart from its established practice of refusing to consider points or questions not raised below. *Youakim v. Miller,* 425 U.S. at 234.

B. *Denial Of Oral Argument Was Proper*

1. *The District Court Was Authorized To Dispense With Oral Argument*

"[L]itigants are not entitled as a matter of right to an oral hearing on every motion." *Goodpasture v. Tennessee Valley Auth.,* 434 F.2d 760, 764 (6th Cir. 1970); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630-31 (1962). Rather, the decision whether to hear oral argument on a motion lies in the sound discretion of the court as part of its administrative function. *Bratt v. Int'l Business Mach. Corp.,* 785 F.2d 352, 363 (1st Cir. 1986). Indeed, the practice of dispensing with oral arguments on motions except in complicated cases is recommended by eminent authorities. *See Proceedings of the Seminar on Procedures for Effective Judicial Admin.,* 29 F.R.D. 191, 301 (1961).

Consistent with this practice, Local Rule 230(h) of the Eastern District of California states that motions "may be submitted upon

the record and briefs on file if the parties stipulate thereto, or if the Court so orders . . . " Pet. at 26a. Such rule is contemplated by Fed. R. Civ. P. 78, which provides that in order to expedite its business, the court may provide by local rule for the submission and determination of motions without oral hearing. Pet. at 5; *See Morrow v. Topping,* 437 F.2d 1155 (9th Cir. 1971). The district court's decision to act upon Gwin's Rule 60(b) motion without hearing oral argument was therefore "in full compliance with established procedure." *Morrow v. Topping,* 437 F.2d at 1156.

2. *There Has Been No Denial Of Due Process*

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). A corollary to this rule is that due process does not require the opportunity for *oral* argument in every case. Rather, "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." *Federal Communications Comm'n v. WJR, The Goodwill Station, Inc.,* 337 U.S. 265, 276 (1949).

In determining whether the procedure used in a particular case comports with due process, a court must balance three factors: "(1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail." *Mathews v. Eldridge,* 424 U.S. at 355.

a. *The Private Interest At Stake Is The Right To Maintain A Civil Action For Monetary Damages*

The starting point for determining how much "process" is due in a given case begins with an inquiry into the nature of the interest adversely affected by the official action. *Mathews v. Eldridge,* 424 U.S. at 355. In this case the official action is the district court's dismissal of Gwin's complaint and the denial of her Rule 60(b) motion. The interest affected by the official action

is Gwin's ability to pursue her product liability case against Searle. However, in an effort to articulate a legal issue appropriate for review, Gwin attempts to shift the focus of the inquiry from the interest affected by the official action, to the interest affected by the particular injury alleged in the complaint. Gwin asserts that trial courts must permit oral argument on dispositive motions whenever the underlying complaint alleges an injury which interferes with the exercise of a fundamental right. Pet. at 22. Since the complaint in this case alleges a physical injury which interferes with the exercise of her right to procreate, Gwin concludes that she was entitled to an oral hearing on her Rule 60(b) motion.

Gwin cites no case in which a court has looked to the underlying injury alleged in the complaint in deciding whether an oral hearing is required. Instead, she bases her argument on language found in the privacy decisions of this Court. Pet. at 21-22. *See Skinner v. Oklahoma,* 316 U.S. 535 (1942) (sterilization of "habitual criminals"); *Roe v. Wade,* 410 U.S. 113 (1973) (access to abortions); and *Carey v. Population Serv. Int'l,* 431 U.S. 678 (1977) (access to contraceptives). What Gwin overlooks, however, is the underlying premise of those decisions: "that the Constitution protects the right of the individual to be free from unwarranted *governmental intrusion* into the decision whether to bear or beget a child." *Carey v. Population Serv. Int'l,* 431 U.S. at 688 (emphasis added).

The district court did not deprive Gwin of her right to procreate, or otherwise interfere with her privacy interests. Indeed, no court has ever held that a product liability claim arising out of alleged injuries to a plaintiff's reproductive organs involves a "violation of the plaintiff's privacy rights." *Cf. Parham v. Hughes,* 441 U.S. 347, 358 n.12 (1978) ("It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right."). The district court here simply decided that Gwin's civil action should be dismissed for failure to prosecute, and that relief from the judgment was not warranted. Thus, the only interest arguably affected by the court's action was Gwin's right to seek monetary damages for personal injuries allegedly caused by another's wrongdoing. While this interest is important, the fifth amendment

does not require that an oral hearing be provided before it may be terminated.[3] *Link v. Wabash R.R. Co.*, 370 U.S. at 633 (dismissal of a personal injury action *sua sponte* for lack of prosecution does not violate due process; indeed, "a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting"); *Morrow v. Topping*, 437 F.2d at 1156-57.

b. *The Risk Of Erroneous Deprivation In The Procedure Used By The District Court Is Slight*

The second factor to be weighed in deciding what process is due, is the risk of erroneous deprivation of the private interest through the procedure used, and the probable value of additional procedural safeguards. *Mathews v. Eldridge*, 424 U.S. at 355. Relying on language found in *Goldberg v. Kelly*, 397 U.S. at 254, Gwin asserts that there is a high risk of error in denying an oral hearing when a factual determination turns on the credibility of sworn statements. Pet. at 23-25. However, the fifth amendment does not require that an oral hearing be afforded whenever credibility issues are involved:

> [Plaintiff] finds in the due process clause of the Fifth Amendment a requirement that when there are issues of credibility . . . no determination of fact may be made unless the decider has either seen the witnesses himself or has been furnished with a report as to credibility by another who

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[3]The private interest in maintaining a personal injury action does not compare with the interest at stake in *Goldberg v. Kelly*, 397 U.S. 254 (1970), a case heavily relied upon by Gwin. In determining that due process required an evidentiary hearing prior to the termination of welfare benefits, the Court emphasized that such termination may deprive a person "on the very margin of subsistence" of the "very means by which to live." *Id.* at 264. Moreover, the Court has since noted that *Goldberg* represents the exception to the general rule that something less than a full evidentiary hearing is required before government benefits may be terminated. *See Mathews v. Eldridge*, 424 U.S. at 333 (termination of Social Security benefits presented less of a compelling private interest than the terminated welfare benefits in *Goldberg*).

> has . . . We discern no such absolute in the history laden words of the Fifth Amendment.

Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129 (2d Cir. 1967) (Friendly, J.), *cert. denied,* 389 U.S. 839 (1967).

Moreover, Gwin's reliance on *Goldberg v. Kelly,* 397 U.S. at 254, is misplaced. As the Court noted in *Mathews v. Eldridge,*

> [t]he decision in *Goldberg* was based on the Court's conclusion that written submissions were an inadequate means for the [welfare] recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the 'educational attainment necessary to write effectively' and could not afford professional assistance.

424 U.S. at 345 (citations omitted). The *Mathews* Court concluded that in order to comport with due process, "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to the *'capacities and circumstances of those who are to be heard'* [citation] to insure that they are given a meaningful opportunity to present their case." *Id.* at 348-49 (emphasis added).

In the present case, Gwin, unlike the welfare recipient in *Goldberg,* was afforded an extensive paper hearing in which she was represented by experienced counsel. *Cf. Buttrey v. United States,* 690 F.2d 1170, 1178 (5th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983). The record clearly establishes that prior to ruling on the Rule 60(b) motion, the district court was provided with voluminous factual detail relating to the reasons for Gwin's failure to attend the dismissal hearing. The briefs and affidavits fully recounted the circumstances surrounding the dismissal. Thus, there can be no serious argument that Gwin was unable to understand the issues involved in the motion and "present [her] arguments effectively in written form." Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1278 (1975); *Buttrey v. United States,* 690 F.2d at 1178 n.4.

Furthermore, no showing has been made that the additional procedural safeguard requested by Gwin — an oral hearing and

argument on her Rule 60(b) motion — would have produced any further evidence justifying relief from judgment. Rather, any further testimony or argument would have been cumulative. *See Proceedings of the Seminar on Procedures for Effective Judicial Admin.*, 29 F.R.D. at 301 ("If the parties have stated their positions and arguments fully in the briefs, it is thought that argument would be little more than a rehash of the briefs."); *cf. Spark v. Catholic Univ. of Am.*, 510 F.2d 1277, 1280 (D.C. Cir. 1975); *Margoles v. Johns*, 587 F.2d 885 (7th Cir. 1978), *cert. denied*, 430 U.S. 946 (1977). Thus, it is unlikely that the additional procedural safeguard requested by Gwin would have increased the accuracy of, or changed, the district court's decision.

c. *The Burden On The Courts In Providing The Opportunity For Oral Argument And Oral Hearing Is Substantial*

The final inquiry in determining whether due process requires a particular procedural safeguard, is the financial and administrative cost of providing the additional safeguard. *Mathews v. Eldridge*, 424 U.S. at 347-48. While the burden to the courts alone is not controlling, "at some point the benefit of an additional safeguard to the individual affected by the [official] action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Id.* at 348.

There is no question that the burden on the district courts is considerable and that eliminating oral argument can save the courts valuable time. *Bratt v. Int'l Business Mach. Corp.*, 785 F.2d at 363 ("District court judges must be permitted to assess the need for oral argument in a case without concern that they are creating a *pro forma* ground for appeal."); *Superior Trucking Co., Inc. v. United States*, 614 F.2d 481 (5th Cir. 1980). While Gwin acknowledges that the burden on the courts would be significant if an oral hearing was required on every dispositive motion, she asserts that the burden can be minimized by providing "some distinguishing factor to guide the lower courts." Pet. at 25-27. Gwin then suggests that "the right affected by the injury [alleged

in the underlying complaint] could be the distinguishing factor." Pet. at 27.

Assuming, *arguendo,* the test urged by Gwin were adopted, how would it be applied? Would the trial court be required to grant oral argument where the plaintiff alleges a loss of fertility, but not where she alleges personal injuries causing the loss of an eye or a limb resulting in her inability to obtain gainful employment? How would the trial court decide when an alleged injury interferes with a plaintiff's right to the pursuit of happiness? And does the mechanism by which the injury was allegedly sustained factor into the decision; *i.e.,* would a contraceptive case be treated the same as an automobile accident case, where the ultimate injury alleged in each case is the loss of a woman's ability to bear children? Contrary to Gwin's assertion that "a bright line does exist" (Pet. at 27), these questions demonstrate the multitude of problems that would face a court in deciding when a "fundamental right" is at stake in an underlying action such as to require an oral hearing.

In sum, Gwin's private interest in maintaining her personal injury action, while important, is not so substantial as to require more than the extensive paper hearing she received on her Rule 60(b) motion; nor is the added value of an oral hearing on such motion sufficient to justify the additional burden it would impose upon the already overburdened courts. After weighing all of these considerations in the balance, it is obvious that Gwin was given all the procedural protections to which she was entitled under the due process clause of the Constitution.

C. *There Is No Conflict Among The Circuits*

In a final attempt to obtain certiorari, Gwin states that "consideration by this Court is necessary to establish a consistency among the judicial districts" in determining when an oral hearing is required on a Rule 60(b) motion. Pet. at 28. Gwin bases this argument on the premise that the district court in this case applied a "material assistance test" rather than a procedural due process test in denying an oral hearing. Pet. at 20, 26, 28-29. This argument is without merit. Although the district court *concluded* that oral argument would be "of no material assistance" (Pet. at

6a), it does not follow therefrom that the court failed to consider the relevant factors in the due process analysis in reaching that conclusion. *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (the district court was not required to make explicit findings to show that it considered the essential factors in determining whether to dismiss a case for lack of prosecution).[4]

Moreover, Gwin fails to cite a single decision in conflict with the decisions of the courts below. On the other hand, cases can be found from almost every circuit sustaining the denial of oral argument on dispositive motions in civil actions.[5] Thus, contrary to the assertion that "the lower courts need guidance" in determining when an oral hearing is required (Pet. at 28), the courts have been consistently deciding this question for decades with no apparent difficulty.

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[4]*See, e.g., Butterman v. Walston & Co.*, 50 F.R.D. 189, 190 (E.D. Wis. 1970) (district court concluded that "oral argument would not have been helpful" after considering plaintiff's due process claim); *National R.R. Passenger Corp. v. I.C.C.*, 610 F.2d 881, 887 n.30 (D.C. Cir. 1979) (circuit court found no due process violation in denial of oral hearing based on Interstate Commerce Commission's finding that "an oral hearing would not serve a useful purpose"); *Proceedings of the Seminar on Procedures for Effective Judicial Admin.*, 29 F.R.D. at 301 ("[o]ral arguments are not granted as a matter of course, but the judge decides whether argument would be profitable, or is unnecessary, and acts accordingly").

[5]*See, e.g., Bratt v. Int'l Business Mach. Corp.*, 785 F.2d 352, 363 (1st Cir. 1986); *Wilkins v. Rogers*, 581 F.2d 399, 405 (4th Cir. 1978); *Price v. McGlathery*, 792 F.2d 472, 475 (5th Cir. 1986); *Goodpasture v. Tennessee Valley Auth.*, 434 F.2d 760, 764 (6th Cir. 1970); *In re Narowetz Mechanical Contractors, Inc.*, 898 F.2d 1306, 1309 (7th Cir. 1990); *Rose Barge Line, Inc., v. Hicks*, 421 F.2d 163, 164 (8th Cir. 1970); *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1387 (9th Cir. 1988); *Hazen v. Southern Hills Nat'l Bank*, 414 F.2d 778, 780 (10th Cir. 1969); *Spark v. Catholic Univ. of Am.*, 510 F.2d 1277, 1280 (D.C. Cir. 1975), *cert. denied*, 430 U.S. 946 (1977); *Hilton v. W.T. Grant Co.*, 212 F. Supp. 126, 128 (W.D. Pa. 1962); *Butterman v. Walston & Co.*, 50 F.R.D. 189, 190 (E.D. Wis. 1970); *Fried v. Fried*, 113 F.R.D. 103, 106 n.9 (S.D.N.Y. 1986).

In short, there is no conflict among the judicial districts or appellate circuits for this Court to resolve.

III.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated: San Francisco, California
June 13, 1990

Respectfully submitted,

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